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In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

MARIAN BROCKAMP, ADMINISTRATOR OF THE ESTATE OF STANLEY B. MCGILL

UNITED STATES OF AMERICA, PETITIONER

v.

NICHOLAS T. SCOTT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the doctrine of equitable tolling may be applied to enlarge or suspend the statutory periods that limit (i) the time in which a claim for refund of taxes may be filed (26 U.S.C. 6511(a)) and (ii) the amount of recovery on a claim (26 U.S.C. 6511(b)(2)).

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OPINIONS BELOW

1. The opinion of the court of appeals in *United States* v. *Brockamp* (Pet. App. 1a-16a) is reported at 67 F.3d 260. The opinion of the district court (Pet. App. 17a-30a) is reported at 859 F. Supp. 1283.

2. The opinion of the court of appeals in *United States* v. *Scott* (Pet. App. 31a-34a) is unpublished, but the decision is noted at 70 F.3d 120 (Table). The opinions of the district court (Pet. App. 35a-59a, 60a-

76a) are reported at 847 F. Supp. 1499 and 795 F. Supp. 1028.

JURISDICTION

The judgments of the court of appeals in *United States* v. *Brockamp* and *United States* v. *Scott* were entered on October 5, 1995. On December 27, 1995, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including February 2, 1996. The petition was filed on January 31, 1996, and was granted on June 3, 1996. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 6511 of the Internal Revenue Code, 26 U.S.C. 6511, provides in relevant part:

(a) Period of limitation on filing claim

Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid.

(b) Limitation on allowance of credits and refunds

(1) Filing of claim within prescribed period

No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within such period.

(2) Limit on amount of credit or refund

(A) Limit where claim filed within 3-year period

If the claim was filed by the taxpayer during the 3-year period prescribed in subsection (a), the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return. If the tax was required to be paid by means of a stamp, the amount of the credit or refund shall not exceed the portion of the tax paid within the 3 years immediately preceding the filing of the claim.

(B) Limit where claim not filed within 3-year period

If the claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim.

(C) Limit if no claim filed

If no claim was filed, the credit or refund shall not exceed the amount which would be allowable under subparagraph (A) or (B), as the case may be, if claim was filed on the date the credit or refund is allowed.

2. Section 7422(a) of the Internal Revenue Code, 26 U.S.C. 7422(a), provides:

(a) No suit prior to filing claim for refund

No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

STATEMENT

A. *United States* v. *Brockamp*

1. Respondent Marian Brockamp is the administrator and sole beneficiary of the estate of her father, Stanley McGill. On April 15, 1984, Mr. McGill transmitted $7000 to the Internal Revenue Service in payment of income taxes for 1983. Accompanying the check was an application for an extension of time in which to file his return for that year. Mr. McGill did not, however, thereafter file either a return or a claim for refund for the 1983 tax year. In 1984, Mr. McGill

was 93 years old. According to respondent, he was "senile" and "mentally deranged" at that time (Pet. App. 18a-19a).

Mr. McGill died in 1988. After respondent was appointed administrator of his estate, she wrote the IRS to request a refund of the taxes that he paid for 1983. She stated that her father "had mistakenly sent a check for $7000 instead of $700" to the IRS (Pet. App. 19a).[1] Respondent thereafter submitted an income tax return for Mr. McGill for the 1983 tax year which indicated that his liability for taxes for that year was $427 (*id.* at 19a, 24a).

The IRS denied the requested refund. The Service noted that the taxes were paid "more than three years prior to her claim" (Pet. App. 19a) and that the requested refund was therefore barred by Section 6511 of the Internal Revenue Code, 26 U.S.C. 6511.

2. Mrs. Brockamp thereafter commenced this tax refund action in federal district court on behalf of the estate. She contended (i) that the doctrine of equitable tolling applies to the limitation periods for income tax refund claims under Section 6511 and (ii) that the claimed mental incompetency of Mr. McGill is a sufficient basis for applying equitable tolling.[2]

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[1] The contention that Mr. McGill was senile was supported only by Mrs. Brockamp's affidavit, which was submitted in support of her motion for summary judgment. The court of appeals concluded that equitable tolling was applicable to tax refund suits and remanded the case for the district court to determine whether Mr. McGill was competent when he paid his taxes in 1984 (Pet. App. 8a).

[2] Respondent also contended that the $7000 payment made by Mr. McGill was only a "deposit"—and not a payment of taxes—and was therefore not subject to the limitation periods of Section 6511 (Pet. App. 22a). The district court rejected

The district court concluded that the doctrine of equitable tolling does not apply to the statutory limitations on tax refund claims set forth in Section 6511 of the Code. The court first noted (Pet. App. 20a) that Section 7422(a) of the Code specifies that courts may not exercise jurisdiction over a tax refund suit unless "a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard" (26 U.S.C. 7422(a)). The court observed that the applicable "provisions of law" are contained in Section 6511(a), which provides that a claim for refund must be filed (26 U.S.C. 6511(a))

> within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid.

Because the refund claim submitted by respondent fell outside these statutory periods, the district court concluded that it lacked jurisdiction over the suit under Section 7422(a) (Pet. App. 21a, 29a-30a).

The court further noted that, "[i]n addition to the time limitations of Section 6511(a), Section 6511(b) limits the *amount* of a refund recoverable by a claimant" (Pet. App. 21a-22a (emphasis added)):

> Specifically, if a person files a timely claim within the three-year period mentioned in

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that contention, noting that "[t]here is no evidence that the check was intended as a deposit" (*id.* at 23a). The court of appeals reversed the district court on other grounds and therefore did not address respondent's contention that the payment was a "deposit." See *id.* at 8a n.1 (Fernandez, J., dissenting).

> Section 6511(a), the amount of a refund is limited to the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return.

26 U.S.C. §6511(b)(2)(A). If, however, a claim was not timely filed within the three-year period mentioned in Section 6511(a), the amount of

> refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim.

26 U.S.C. §6511(b)(2)(B). * * *

The court explained that the provisions of Section 6511(b) that establish substantive limitations on the *amount* of any refund—even on a timely filed claim—are not subject to the doctrine of equitable tolling (Pet. App. 21a-22a, 27a-28a).

The district court noted that in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), this Court "recognized that the courts have traditionally declined to apply equitable principles in cases against the government because waivers of sovereign immunity are to be strictly construed" (Pet. App. 25a, citing 498 U.S. at 96-99). In *Irwin*, however, the Court "changed its approach to the issue of equitable tolling against the government" and held that (Pet. App. 25a, quoting 498 U.S. at 95-96)

> the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States.

Several lower courts thereafter relied on *Irwin* to "extend[] the doctrine of equitable tolling to tax refund cases" (*id.* at 25a-27a, citing cases). The district court concluded, however, that those decisions were not correct. The court noted that in *Oropallo* v. *United States*, 994 F.2d 25 (1993), cert. denied, 114 S. Ct. 705 (1994), the First Circuit (in a per curiam opinion joined by then-Judge Breyer) concluded that the "rebuttable presumption" that equitable tolling applies to suits against the government is inapplicable to tax refund suits because the "limitations imposed by Sections 6511(a) and (b) are fundamentally inconsistent with the doctrine of equitable tolling" (Pet. App. 27a, citing 994 F.2d at 30-31). The district court also noted that in *United States* v. *Dalm*, 494 U.S. 596 (1990), this Court held that an equitable claim for recovery of a tax overpayment was not exempt from the limitation periods of Section 6511 (Pet. App. 28a-29a, citing 494 U.S. at 610).

Applying the reasoning of *Oropallo* and *Dalm*, the district court held that the periods of limitations on refund claims and refund recoveries under Sections 6511(a) and (b) are not subject to the doctrine of equitable tolling. Because the refund claim in this case was filed outside those periods of limitations, the court entered judgment for the government (Pet. App. 30a).

3. The court of appeals reversed (Pet. App. 1a-8a), with Judge Fernandez dissenting (*id.* at 8a-16a). The majority opinion stated that this Court's decision in *Irwin* "effectively limited the *Dalm* decision" and "requires that, in the absence of congressional action, statutes of limitations are, as a general rule, presumed to be subject to equitable tolling in suits against the United States" (*id.* at 5a). The court

found nothing in the text or history of Section 6511 to indicate "any intention [by Congress] that equitable tolling should not apply to § 6511" (*ibid.*). The court therefore concluded that "the statute of limitations provided in § 6511 may be equitably tolled" (*ibid.*).

The court noted that, in contexts not involving tax refund claims, "several post-*Irwin* courts have held that mental incompetence will toll statutes of limitation in suits against the government" (Pet. App. 7a, citing cases). The court stated that it agreed with those decisions because (*id.* at 8a)

> [p]rinciples of equity mandate that when mental incompetence precludes a person from asserting his rights during the proper time period, he should not be precluded from later seeking redress for his injuries.

Because a "triable issue of fact [exists] as to Mr. McGill's mental incompetence," the court of appeals reversed the decision of the district court and remanded for further proceedings (*ibid.*). See note 1, *supra*.

Judge Fernandez dissented from the decision of the court of appeals because "the principles of equitable tolling cannot be applied to § 6511" (Pet. App. 9a, 10a):[3]

> [A]lthough *Irwin* creates a rebuttable presumption of equitable tolling in most areas, *Dalm*

[3] Judge Fernandez noted that several other courts have held that equitable tolling cannot apply to Section 6511. See Pet. App. 10a-11a, citing *Vintilla* v. *United States*, 931 F.2d 1444, 1446-1447 (11th Cir. 1991); *Webb* v. *United States*, 850 F. Supp. 489, 491-493 (E.D. Va. 1994), aff'd, 66 F.3d 691 (4th Cir. 1995), petition for cert. pending, No. 95-1360. The majority opinion in *Brockamp* did not address those conflicting decisions.

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effectively rebuts that presumption because in it the Supreme Court determined that principles of equity would not be applied to toll § 6511.

Judge Fernandez further noted that (*id.* at 13a),

> [a]s *Oropallo*, 994 F.2d at 27, pointed out, in addition to the limitations periods imposed by § 6511(a), subsection (b) of § 6511 places limits on the amount of any refund a claimant may receive. Under § 6511(b)'s provisions, [respondent] would not be able to collect any refund even if her suit were allowed to go forward under subsection (a) because the gap between the time that her father made the payments to the IRS and the time that she filed the refund claim is too great.

Judge Fernandez concluded that Section 6511(b) operates as a period of repose, imposing an outside limit on recovery so that "the government may finally have closure as to particular tax returns" (Pet. App. 14a).

B. *United States* v. *Scott*

1. In 1984, respondent Nicholas Scott made estimated tax payments of $30,096 for his 1984 tax liability.[4] In 1989, respondent filed a belated tax return for 1984 claiming that he had no tax liability for 1984 and requesting a refund of the amounts he had previously paid. The Internal Revenue Service denied the requested refund because it was untimely under Section 6511 of the Code (Pet. App. 32a).

[4] Mr. Scott is an attorney. By 1984, he had ceased practicing law and was actively involved in the operation of a retail wine store (Pet. App. 36a, 38a-41a, 44a-45a).

Respondent then commenced this tax refund suit in federal district court. He conceded that the statute of limitations for his refund claim had expired, but he contended that his claim should be allowed because, from the time his 1984 tax return was due until the time he filed that return in 1989, he was mentally incompetent from alcoholism (Pet. App. 37a, 61a). The district court concluded that the doctrine of equitable tolling applies in tax refund suits and that the limitations of Section 6511 should not be applied in this case because respondent "was an alcoholic whose alcoholism rendered him mentally incompetent and unable to file a tax return from January 1985 through November 1989" (Pet. App. 33a).[5] The court therefore entered judgment for respondent.

2. The court of appeals affirmed, relying wholly on the decision entered on the same day by the same panel in *United States* v. *Brockamp* (Pet. App. 33a, 34a). See pages 8-9, *supra*. Judge Fernandez again dissented, for the reasons set forth in his dissent in *Brockamp* (*id.* at 34a).

SUMMARY OF ARGUMENT

A. The doctrine of equitable tolling does not apply to income tax refund suits. No suit for the recovery of an internal revenue tax is permitted unless the taxpayer has "duly filed" an administrative claim for refund "according to the provisions of law" (26 U.S.C. 7422(a)). The applicable "provisions of law" are set forth in Section 6511 of the Code. With respect to a tax for which a return is required (such as an income

[5] The court reached these factual conclusions following a trial at which it received evidence pertaining to the effect of Mr. Scott's alcoholism on his business and personal affairs over the period from 1984 to November 1989 (Pet. App. 37a-42a).

tax), Section 6511(a) requires that an administrative refund claim be filed within three years of the time the return was filed or two years of the time the tax was paid, "whichever of such periods expires the later." 26 U.S.C. 6511(a).

Section 6511(b)(1) of the Code makes it clear that a claim not filed within these express statutory periods may not be allowed, for it states that "[n]o credit or refund shall be allowed or made after the expiration of th[is] period * * * unless a claim for credit or refund is filed by the taxpayer *within such period*." 26 U.S.C. 6511(b)(1) (emphasis added). Congress reemphasized that conclusion by further specifying that any refund or credit given on a claim that is filed after the expiration of the statutory periods of limitation is "erroneous" and to be "considered void" (26 U.S.C. 6514(a)(1)). Moreover, even when a refund claim *is* filed within the periods specified in Section 6511(a), Congress has limited "the amount of the credit or refund" to the "portion of the tax paid within" those statutory periods—and has thereby again precluded any recovery on untimely claims. See 26 U.S.C. 6511(b)(2)(A)-(C). Other than the singular decision of the court of appeals in the present case, the courts of appeals have uniformly concluded that these express, carefully articulated, interlocking statutory limits on tax refund claims may not be disregarded through application of a judge-made doctrine of "equitable tolling."

This Court noted in *United States* v. *Dalm*, 494 U.S. 596, 610 (1990), that "Congress has legislated a set of exceptions to the limitations period" for tax refund claims. For example, in the specific situations described in Sections 1311-1314 of the Code, Congress has "mitigated" the effect of the statute of limitations

for tax refund claims by permitting untimely claims to be made. 26 U.S.C. 1311-1314. See also 26 U.S.C. 6511(d). As the Court concluded in *Dalm*, an untimely suit for refund that "does not come within these provisions" may not proceed, for any other conclusion would impermissibly "overrid[e] Congress' judgment as to when equity requires that there be an exception to the limitations bar." 494 U.S. at 610.

B. This Court's decision in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), neither compels nor supports a different conclusion. In *Irwin*, the Court held that a statutory 30-day period for commencing suit against the government under Title VII of the Civil Rights Act is subject to equitable tolling. The Court stated that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States" (*id.* at 95-96). The Court reasoned that a presumption of equitable tolling is, in general, "likely to be a realistic assessment of legislative intent" (*id.* at 95). But the Court emphasized that the presumption is rebuttable and that particular legislation "may provide otherwise" (*id.* at 96).

As four other courts of appeals have concluded, the Ninth Circuit erred in the present case in concluding that the "rebuttable presumption of equitable tolling" applies to the statutes governing tax refund claims. These detailed statutes do more than merely limit the time for commencing suit—they also expressly and unequivocally prohibit the payment of claims that have not been filed within the defined statutory periods (26 U.S.C. 6511(b)(1)) and further provide that any payment of such a claim would be "erroneous" and "void" as a matter of law (26 U.S.C. 6514(a)).

The provisions of Section 6511(b) of the Code do not represent a "statute of limitations" for the commencement of a suit or the filing of a claim. Instead, they impose *substantive* limitations on the amount of recovery that (i) preclude *any* payment on a claim filed outside the express statutory periods established in Section 6511(a) and (ii) limit the amount of any refund to the "portion of the tax paid within" those express statutory periods—and thereby prohibit any refund of taxes for which an untimely claim was made. 26 U.S.C. 6511(b)(1), (b)(2)(A)-(C). Because Section 6511(b) imposes *substantive*, rather than procedural, limitations on tax refund recoveries, the requirements of that statute are not subject to modification under the doctrine of equitable tolling.

These substantive limitations on tax refund claims confirm that Congress has insisted upon a definite and unyielding point of repose for such claims. Especially in light of the fact that approximately 200,000,000 tax returns are filed each year—any of which could potentially be the subject of an untimely refund claim—the only "realistic assessment of legislative intent" manifested by these statutes is that Congress did *not* intend the detailed limitations provisions that it has enacted to be disregarded on "equitable" grounds. In this case, as in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350 (1991), the presumption of equitable tolling described in *Irwin* is inapplicable because the statutory scheme manifests a legislative policy of repose that cannot be reconciled with equitable tolling.

ARGUMENT

THE DOCTRINE OF EQUITABLE TOLLING MAY NOT BE APPLIED TO ENLARGE OR SUSPEND THE STATUTORY PERIODS THAT LIMIT THE TIME FOR FILING, AND THE AMOUNT OF RECOVERY ON, TAX REFUND CLAIMS

A. THE DOCTRINE OF EQUITABLE TOLLING DOES NOT APPLY TO TAX REFUND CLAIMS

1. *The Evolution of the Refund Claim Requirement.*

For the first one hundred years of our Nation's history, only two methods were available for obtaining a refund of taxes that had been improperly or unlawfully collected. First, a taxpayer could apply to Congress for a private bill authorizing an appropriation to pay monies from the Treasury to refund the taxes. Such private bills were necessary because, in the absence of any general legislation authorizing such recoveries, suits seeking money judgments directly against the sovereign were not permitted both as a matter of constitutional tradition and constitutional text. See U.S. Const. Art. I, § 9, Cl. 7 ("No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."). The only judicial remedy available to a taxpayer prior to 1887 was a suit directly against the Collector who had exacted and received the allegedly erroneous payment of taxes. The theory of such an action was that the

suit was against the Collector in his personal capacity and was not against the sovereign.[6]

From the beginning of this history, the United States has insisted upon a prompt claim for refund as a condition of refunding taxes that have been improperly collected. In the judicial action against the Collector, it was a prerequisite to any relief that the taxpayer make a protest and demand for refund *at the time the taxes were paid*. The rationale for this requirement was that, if the Collector had paid the taxes over to the Treasury before receiving notice of the taxpayer's protest, (i) the Collector was then exonerated from personal liability and (ii) the monies could not be obtained directly from the Treasury because no statute had then authorized suit against the United States. *Elliott* v. *Swartwout*, 35 U.S. (10 Pet.) 137, 158 (1836). See also *Bend* v. *Hoyt*, 38 U.S. (13 Pet.) 263, 267 (1839).[7]

In 1875, Congress supplanted the requirement that a "protest" be made to the Collector at the time of

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[6] The history of the origins of the tax refund suit is described in substantial detail in the majority and dissenting opinions in *Flora* v. *United States*, 362 U.S. 145 (1960).

[7] The first statute that Congress enacted to afford taxpayers a right to sue Collectors for refunds codified the "protest" requirement by specifying that no action for the recovery of customs duties could "be maintained against any collector * * * unless the said protest was made in writing, and signed by the claimant, *at or before the payment* of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof." Act of Feb. 26, 1845, ch. 22, 5 Stat. 727 (emphasis added). This requirement of prompt protest, which originated in customs cases, was also applied in all other suits seeking recovery of federal taxes. See *City of Philadelphia* v. *The Collector*, 72 U.S. (5 Wall.) 720, 730-733 (1867).

payment with a new requirement that an administrative refund claim be filed with the Secretary as a precondition of any suit for the recovery of an internal revenue tax. Section 3226 of the Revised Statutes of 1875,[8] which exists in substantially unmodified form as Sections 7422(a) and (b) of the Internal Revenue Code (see *Flora* v. *United States*, 362 U.S. at 152 n.11, 155-156 n.16), removed the requirement of a "protest" (26 U.S.C. 7422(b)) and specified instead (in its modern text) that (26 U.S.C. 7422(a)):

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected * * * until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

In imposing this new requirement of an administrative "claim for refund," Congress maintained the insistent, historical rule that the refund claim must be made promptly. The applicable statute then specified that "all suits and proceedings for the recovery of any internal tax * * * shall be brought within two years next after the cause of action accrued *and not after*; and all claims for the refunding of any internal tax or penalty shall be presented to the commissioner of internal revenue within two years next after the cause of action accrued *and not*

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[8] This statute was derived from Section 19 of the Act of July 13, 1866, ch. 184, 14 Stat. 152.

after" (Act of June 6, 1872, ch. 315, § 44, 17 Stat. 257-258 (emphasis added)).

It was under this inflexible statutory framework that Congress, in the Tucker Act, first provided a limited jurisdiction for federal courts to adjudicate tax refund claims in suits brought directly against the United States. See Act of Mar. 3, 1887, ch. 359, 24 Stat. 505. A more general jurisdiction to adjudicate such claims was established in 1921. 28 U.S.C. 1346(a)(1).[9] Having provided this direct remedy against the United States, Congress determined that suits against the Collector for the recovery of taxes were no longer to be permitted. 26 U.S.C. 7422(f)(1).

2. *The Current Statutory Framework.*

After the federal income tax was enacted at the beginning of this Century, Congress found it necessary to refine its tax refund provisions to meet more particularly the annual reporting cycles of that tax. A series of legislative enactments has culminated in what is now Section 6511 of the Code. That Section establishes an intricate and comprehensive structure for the disposition of all tax refund claims—a structure that combines the requirement of a prompt pre-

[9] Prior to 1921, the jurisdiction of the federal district courts in suits against the United States was limited to refund claims seeking a recovery of less than $1000. In 1921, Congress authorized suits for tax refunds in federal district courts without regard to the amount in controversy. See 28 U.S.C. 1346(a)(1). The language of this jurisdictional provision is drawn directly from Section 3226 of the Revised Statutes (which is now codified, with slight modifications, as Section 7422(a) of the modern Code). Compare 28 U.S.C. 1346(a)(1) with 26 U.S.C. 7422(a). See *Flora* v. *United States*, 362 U.S. at 188-190 (Whittaker, J., dissenting).

sentation of the claim with several substantive limits on recovery. 26 U.S.C. 6511(a), 6511(b).[10]

No suit for the recovery of an internal revenue tax is permitted unless the taxpayer has "duly filed" an administrative claim for refund "according to the provisions of law" (26 U.S.C. 7422(a)). The applicable "provisions of law" are those set forth in Section 6511(a) of the Code. With respect to a tax for which a return is required (such as an income tax), Section 6511(a) requires that an administrative refund claim be filed within three years of the time the return was filed or two years of the time the tax was paid,

[10] Sections 6511(a) and 6511(b) were enacted in essentially their current form as part of the Internal Revenue Code of 1954 (Aug. 16, 1954, ch. 736, 68A Stat. 808). The precursor of these provisions was Section 281(b) of the Revenue Act of 1924, ch. 234, 43 Stat. 301, in which Congress (i) provided a finite period during which a claim for refund of income, war and excess profits taxes could be made and (ii) then further specified that "[t]he amount" of any refund of such taxes shall not "exceed the portion of the tax paid during the" period expressly permitted for the refund claim to be filed. Similarly, Section 322(b) of the Revenue Act of 1932, ch. 209, 47 Stat. 242, provided a two-year period of limitation for the filing of claims for refund of income taxes—calculated from the time of payment—and also limited the amount of any such refund to the amount of tax paid within the two years prior to the filing of the claim. See *Jones* v. *Liberty Glass Co.*, 332 U.S. 524, 527, 530 (1947). Section 810 of the Revenue Act of 1932, ch. 209, 47 Stat. 283, provided a similar structure for estate tax refunds in order "to remove all question as to the precise effect of a period of limitation on refunds which runs from the payment of the tax." S. Rep. No. 665, 72nd Cong., 1st Sess. 53 (1932). Section 6511 brought these various provisions into a single statute that governs the payment of refund claims for "any tax imposed" under the Internal Revenue Code. 26 U.S.C. 6511(a).

"whichever of such periods expires the later." 26 U.S.C. 6511(a).

Congress did not leave any doubt as to the consequences that are to attend any failure to comply with this statutory filing requirement. Section 6511(b) clearly provides that a claim that is not filed within the express statutory periods of Section 6511(a) may not be allowed, for it specifies that "[n]o credit or refund shall be allowed or made after the expiration of th[is] period * * * unless a claim for credit or refund is filed by the taxpayer *within such period*." 26 U.S.C. 6511(b)(1) (emphasis added).[11] Congress reemphasized that substantive restriction by further specifying that any credit or refund given on a claim that is filed *after* the expiration of the express statutory periods of limitation is "erroneous" and is to be "considered void" (26 U.S.C. 6514(a)(1)). Moreover, even when a refund claim *is* filed within the periods specified in Section 6511(a), Congress has limited "the amount of the credit or refund" to the "portion of the tax paid within" those statutory periods—and has thereby again precluded any recovery on untimely claims. 26 U.S.C. 6511(b)(2)(A)-(C).[12] See also pages 32-33, *infra*.

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[11] Government officers have no power to waive this substantive limitation on recovery on untimely tax refund claims. *United States* v. *Garbutt Oil Co.*, 302 U.S. 528, 533-535 (1938). See also *Overhauser* v. *United States*, 45 F.3d 1085, 1088 (7th Cir. 1995); *Miller* v. *United States*, 949 F.2d 708, 712 (4th Cir. 1991).

[12] Section 6511(b)(2) is designed for the precise purpose of cutting off stale claims. The history of its original precursor (Section 281(b) of the Revenue Act of 1924, ch. 234, 43 Stat. 301) reflects that the statute ensures "that a late payment of a small portion of the tax due may not extend the time for filing a claim for refund of the entire tax" (S. Rep. No. 398, 68th Cong., 1st Sess. 33 (1924)). To accomplish that result, "a limitation has been inserted by the committee restricting the amount of a credit or refund to the portion of the tax paid during the four years [now two years] immediately preceding the filing of the claim." *Ibid.*

3. The Requirements of Sections 6511(a) and (b) Are Not Subject to Equitable Tolling.

a. Other than the decision in the present case, the courts of appeals have consistently concluded that these express, carefully articulated, interlocking statutory limits on tax refund claims may not be disregarded through application of a judge-made doctrine of equitable tolling. See, *e.g.*, *Amoco* v. *Newton Sheep Co.*, 85 F.3d 1464 (10th Cir. 1996); *Webb* v. *United States*, 66 F.3d 691, 700 (4th Cir. 1995), petition for cert. pending, No. 95-1360; *Oropallo* v. *United States*, 994 F.2d 25, 30-31 (1st Cir. 1993). Congress has expressly provided that a refund is not to be "allowed or made" on a claim that is filed "after the expiration" of the periods specified in Section 6511(a). 26 U.S.C. 6511(b)(1). Courts have long held that application of equitable tolling in disregard of these express limitations on tax refund suits would "run[] afoul of the well-established principle that statutes of limitation applicable to suits against the government are conditions attached to the sovereign's consent to be sued and must be strictly construed." *Kreiger* v. *United States*, 539 F.2d 317, 320 (3d Cir. 1976). See also *Republic Petroleum Corp.* v. *United States*, 613 F.2d 518, 527 (5th Cir. 1980); *Kingston Products Corp.* v. *United States*, 368 F.2d 281, 288 (Ct. Cl. 1966);

Young v. *United States*, 203 F.2d 686, 689 (8th Cir. 1953).[13]

In *United States* v. *Kubrick*, 444 U.S. 111 (1979), this Court emphasized that a statute of limitations is a "meritorious defense, in itself serving a public interest." *Id.* at 117, quoting *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 136 (1938). The Court explained that "[s]tatutes of limitations, which 'are found and approved in all systems of enlightened jurisprudence,' represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'" 304 U.S. at 136 (internal citations omitted). See also *United States* v. *Mottaz*, 476 U.S. 834, 851 (1986).

The Court has emphasized that a uniform statute of limitations is of critical importance in the particular context of tax refund claims (*Rothensies* v. *Electric Battery Co.*, 329 U.S. 296, 302 (1946) (footnote omitted):

> As statutes of limitation are applied in the field of taxation, the taxpayer sometimes gets advantages and at other times the Government gets them. Both hardships to the taxpayers and losses to the revenues may be pointed out. They tempt

[13] Compliance with the prompt filing requirement is a condition of the government's waiver of its sovereign immunity and is a jurisdictional prerequisite to a refund suit in district court. See 26 U.S.C. 7422(a) ("[n]o suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected * * * until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard").

> the equity-minded judge to seek for ways of relief in individual cases.

Rejecting the suggestion that equitable grounds may support a decision not to enforce the statute of limitations on tax refund claims, the Court concluded that, "[i]f there are to be exceptions to the statute of limitations, it is for Congress rather than for the courts to create and limit them." *Id.* at 303.

Indeed, as this Court noted in *United States* v. *Dalm*, 494 U.S. at 610, Congress *has* "legislated a set of exceptions to the limitations period" for tax refund claims. In Section 6511(d), Congress expanded the limitations period for claiming refunds based upon several specific types of deductions and credits. A seven-year period of limitations for bad debts and worthless securities was provided in Section 6511(d)(1) to address inequities arising from uncertainty about the worthlessness of a debt (H.R. Rep. No. 2333, 77th Cong., 2d Sess. 44-45 (1942)):

> Under the existing law, the taxpayer may be whipsawed out of a deduction for a bad debt because of the uncertainty as to the time at which the debt becomes worthless. Later evidence often discloses that present decisions as to the year in which a debt becomes worthless are erroneous. * * *
>
> To relieve this inequitable situation, the bill replaces the present 3-year statute of limitations in such cases with a 7-year statute, giving a considerably greater flexibility to the allowance of bad debt deductions in the proper year.

Similarly, Section 6511(d)(2) was adopted because the general application of the statute of limitations could

foreclose use of loss carryback adjustments (H.R. Rep. No. 849, 79th Cong., 1st Sess. 6 (1945)):

> In order to provide a more equitable and adequate operation of the provisions for carry-back adjustments, the bill amends the provisions of existing law relating to the statute of limitations and computation of interest charges as applied to tax adjustments due to carry-backs. In general, these amendments are intended to assure that taxpayers will have an opportunity to claim carry-back adjustments in some instances where, under existing law, they would be prevented by the statute of limitations.

Congress thus elected to provide a series of narrowly-tailored statutory exceptions—rather than endorse a general "equitable" exception—to the limitations provisions of Section 6511.[14]

Only in the detailed situations described in Sections 1311-1314 of the Internal Revenue Code has Congress determined to permit untimely claims to be made. See 26 U.S.C. 1311(a) (permitting a claim within the scope of these provisions to be made even if otherwise "prevented by the operation of any law or rule of law"). These "mitigation" provisions of the Code were enacted to ameliorate the rigid application of the statute of limitations and to provide an

[14] At one time in the past, Congress adopted legislation that excused or reduced the interest rate on deficiencies for estates of "insane, deceased, or insolvent" persons. Revenue Act of 1918, ch. 18, § 250(e), 40 Stat. 1083-1084; Revenue Act of 1921, ch. 136, § 250(e), 42 Stat. 266. Congress eventually deleted that provision, having noted the difficulty of "determining with accuracy the time when a person becomes incompetent" (H.R. Conf. Rep. No. 356, 69th Cong., 1st Sess. 41 (1926)).

"equitable solution" to the problem that exists when the party that asserts the statute of limitations had, prior to the running of the statute, taken a position inconsistent with its current position. See S. Rep. No. 1567, 75th Cong., 3d Sess. 48-49 (1938). In enacting the "mitigation" provisions, Congress emphasized that "the essential function of the statute of limitations" was preserved unimpaired and that the "corrective adjustments" established in these provisions "should * * * never modify the application of the statute" in other contexts. *Ibid.* See also Statement of the House Managers, H.R. Rep. No. 2330, 75th Cong., 3d Sess. 57-58, 59 (1938).[15] As this Court stated in *United States* v. *Dalm*, an untimely suit for refund that "does not come within these provisions" may not proceed, for any other conclusion would impermissibly "overrid[e] Congress' judgment as to when equity requires that there be an exception to the limitations bar." 494 U.S. at 610.

b. There is manifestly an imperative need for predictability and certainty in the processes by which tax refund claims are resolved. More than 200,000,000 tax returns are filed each year.[16] The burdens that would be imposed on administrative and judicial resources by a statute of limitations that potentially

[15] The complex mitigation provisions of the Code would have been unnecessary if the statutes of limitations on refund claims were subject to tolling on equitable principles. See John M. Maguire et al., *Section 820 of the Revenue Act of 1938*, 48 Yale L.J. 509, 515-517, 725-726 (1939).

[16] That figure includes personal and corporate income tax returns, estate tax returns and employment tax returns. Internal Revenue Service, Compliance Research, Document 6186, *Calendar Year Return Projections for the United States and Service Centers: 1995-2002*, at 4-5 (Oct. 1995).

required consideration of the individual characteristics of 200,000,000 tax filers have long been regarded as unacceptable. As this Court has stated in *Rothensies* v. *Electric Battery Co.*, 329 U.S. at 301:

> It probably would be all but intolerable, at least Congress has regarded it as ill-advised, to have an income tax system under which there never would come a day of final settlement and which required both the taxpayer and the Government to stand ready forever and a day to produce vouchers, prove events, establish values and recall details of all that goes into an income tax contest. Hence, a statute of limitation is an almost indispensable element of fairness as well as of practical administration of an income tax policy.

The specific exceptions that Congress has provided from the limitations periods established in Section 6511 reflect the settled understanding of Congress that a general "equitable" exception does not exist from the statutory scheme. For example, even an event as cataclysmic as the Second World War—which unquestionably impeded the ordinary preparation of tax refund claims for many taxpayers—did not alter the strict time and substantive amount limitations contained in the refund claim provisions of the Internal Revenue Code. Instead, Congress found it necessary to enact a specific statutory exception to provide relief from those provisions.[17]

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[17] Section 507 of the Revenue Act of 1942, ch. 619, 56 Stat. 961, suspended the period of limitations for bringing a refund claim for reasons related to the ongoing war.

When Congress has confronted situations in which claims, though barred by the statute of limitations, nonetheless merit relief, it has responded either with detailed adjustments to the statute (such as the "mitigation" provisions) or with private bills.[18] Absent such specific relief by Congress, the statute of limitations for tax refund claims established by Section 6511(a)—and the substantive limitations on the amount recoverable on such claims imposed by Section 6511(b)—are to be enforced in accordance with their terms. By historic design and practice, and under the specific text of the provisions that Congress has enacted, these limitations on refund claims are not subject to the doctrine of equitable tolling. Thus, any change in the law in this area must come from Congress, not the courts.[19]

B. *IRWIN* V. *DEPARTMENT OF VETERANS AFFAIRS* DOES NOT SUPPORT A DIFFERENT CONCLUSION

Prior to this Court's decision in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), no court had held that the provisions of Section 6511 applicable to tax refund claims were subject to equitable tolling. As the court of appeals noted in *Webb* v. *United States*, 66 F.3d at 694, the well-established rule was that all refund claims had to be filed within the limits established in Section 6511 and that equitable princi-

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[18] See, *e.g.*, Act of Sept. 16, 1959, Pub. L. No. 86-280, 73 Stat. 563 (allowing exception to Section 6511 for claim for overpayment by Dexter and Jeanette H. Phillips); see also S. Rep. No. 663, 89th Cong., 1st Sess. (1965).

[19] The Treasury Department has announced that it will submit proposals for modification of Section 6511 for consideration by Congress. See BNA Daily Tax Report G-8 (Mar. 21, 1996).

ples could not override those requirements. See page 21, *supra*.

The court concluded in this case, however, that the decision in *Irwin* radically altered the settled landscape and that the requirements of Section 6511 are now subject to equitable tolling (Pet. App. 3a-7a). As four other courts of appeals have concluded, however, that interpretation and application of this Court's decision in *Irwin* is not correct. See *Amoco* v. *Newton Sheep Co.*, *supra*; *Webb* v. *United States*, 66 F.3d at 699; *Oropallo* v. *United States*, 994 F.2d at 31; *Vintilla* v. *United States*, 931 F.2d 1444, 1446-1447 (11th Cir. 1991).[20]

1. The Rebuttable Presumption of Equitable Tolling Is Inapplicable to Tax Refund Claims

In *Irwin*, the Court held that a statutory 30-day period for commencing suit against the government under Title VII of the Civil Rights Act is subject to equitable tolling. The Court noted that it previously had held that the statutory time limits on suits under Title VII involving *private* defendants are subject to equitable tolling (498 U.S. at 95 & n.2, citing *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393-394 (1982)). The Court concluded, in this context, that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States" (498 U.S. at 95-96). The Court reasoned that such a

[20] In two decisions subsequent to *Vintilla*, the Eleventh Circuit declined to reconsider whether equitable tolling is applicable to tax refund suits because, even if equitable tolling *were* applicable, it would have been unavailable on the facts of those cases. *Rosser* v. *United States*, 9 F.3d 1519 (1993); *First Alabama Bank, N.A.* v. *United States*, 981 F.2d 1226 (1993).

presumption of equitable tolling is "likely to be a realistic assessment of legislative intent" (*id.* at 95). The Court emphasized, however, that the presumption is rebuttable and that particular legislation "may provide otherwise" (*id.* at 96).[21]

[21] The most general limitations provisions that Congress has enacted (which are not applicable to tax refund suits) are inconsistent with the assumption that Congress has, in the past, generally intended statutes of limitations on claims against the United States to be subject to equitable tolling. When Congress first authorized courts to enter judgments for money damages against the United States, it provided that claims were to be submitted "within six years after the claim first accrues" and then further provided (Act of Mar. 3, 1911, ch. 231, § 155, 36 Stat. 1139) (emphasis added):

> That the claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased; *but no other disability than those enumerated shall prevent any claim from being barred* * * *.

These same provisions were also made applicable to proceedings in district courts seeking money judgments against the United States. See *id.* § 24, pt. 20, 36 Stat. 1093.

In *Kendall* v. *United States*, 107 U.S. 123, 125 (1883), the Court noted that Congress had specified "the cases to which the limitation of six years should not apply" and that "[t]he court cannot superadd to those enumerated, a disability arising [from any other cause, such as] sickness, surprise, or inevitable accident, which might prevent a claimant from suing within the time prescribed." The Court emphasized that a claimant must "comply with the terms upon which the government had consented to be sued" and that, in the absence of such compliance, "[h]is remedy, if the claim be a valid one, is to apply to

a. The "rebuttable presumption of equitable tolling" described by the Court in *Irwin* is inapplicable to the statutory provisions that limit tax refund

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the legislative department of the government" for private relief. *Id.* at 126.

In 1948, Congress revised these statutory provisions in the course of a general recodification of Title 28 of the Code. Since the time of that revision, Sections 2401 and 2501 of Title 28 have provided (respectively) that claims against the United States in the district courts and in (what is now) the Court of Federal Claims "shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases." 28 U.S.C. 2401(a); see 28 U.S.C. 2501. The Reviser's Notes to these Sections explain that the revised words " 'person under legal disability or beyond the seas at the time the claim accrues' were substituted for 'claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim' " and that the preexisting language "that disabilities other than those specifically mentioned should not prevent any action from being barred was omitted as superfluous." 28 U.S.C. 2401, 2501 (Reviser's Notes); H.R. Rep. No. 308, 80th Cong., 1st Sess. A185, A192 (1947).

In *Soriano* v. *United States*, 352 U.S. 270, 273 (1957), the Court again emphasized that these general statutes of limitations authorize an exception only for persons who are under a "legal disability" at the time the claim accrued and that courts have no authority to "superadd" or "engraft" additional exceptions to the statute. 352 U.S. at 273-274. The Court also specifically rejected the suggestion that causes that might be sufficient to toll claims in cases involving "private citizens" would suffice to toll claims against the United States, for such tolling principles involving private parties have "no applicability to claims against the sovereign. See *Haycraft* v. *United States*, 22 Wall. 81 (1875)." 352 U.S. at 275.

suits. A rebuttable presumption of equitable tolling necessarily depends upon—and may not be applied inconsistently with—a valid "assessment of legislative intent" (498 U.S. at 95), for only Congress may authorize money recoveries against the United States. U.S. Const. Art. 1, § 9, Cl. 7. Any judge-made rule altering the scope of statutory relief that Congress has authorized against the United States would violate this basic, constitutional principle. The proper focus of judicial inquiry into the meaning and application of a statute that permits or limits recovery upon claims against the United States has therefore always been a determination, from the text and history of the applicable provisions, of what remedy *Congress* intended. *United States* v. *Kubrick*, 444 U.S. 111, 125 (1979).

Nothing in *Irwin* is inconsistent with that conclusion. The Court acknowledged in *Irwin* that the rebuttable presumption that it described would apply only in the absence of an inconsistent expression of legislative intent. See 498 U.S. at 95. If, as in the present case, there is evidence in the text and history of the statute that Congress intended the limitations provisions to be strictly enforced, the "rebuttable presumption" described by the Court can play no role. The decision in *Irwin* does not purport to alter the constitutional principle that it is the intent of Congress that ultimately governs. See also *Bowen* v. *City of New York*, 476 U.S. 467, 479 (1986) (applying equitable tolling "[w]hen application of the doctrine is consistent with Congress' intent in enacting a particular statutory scheme").[2]

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[2] Moreover, as Justice White (joined by Justice Marshall) stated in a concurring opinion in *Irwin*, a "rebuttable pre-

b. The presumption of equitable tolling is inapplicable to (or is "rebutted" in the context of) tax refund suits because equitable tolling is inconsistent with the text and history of the applicable statutory provisions. Congress has left no room for doubt as to the consequences that are to attend any failure to make a tax refund claim within the specific time limits established in Section 6511(a). Section 6511(b)(1) specifies that "[n]o credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in [Section 6511(a)] for the filing of a claim for credit or refund, *unless a claim for credit or refund is filed by the taxpayer within such period*." 26 U.S.C. 6511(b)(1) (emphasis added). To reemphasize that same point, Congress further provided that, if any credit or refund *is* made on a claim submitted after the specific periods provided by Section 6511(a) have expired, that credit or refund is "erroneous" and is to be "considered void." 26 U.S.C. 6514(a).

The provisions of Section 6511(b) of the Code—which supplement and enforce the specific periods of limitation established in Section 6511(a)—do not themselves represent a "statute of limitations" for the commencement of a suit or the filing of a claim. Instead, Section 6511(b) establishes *substantive* limitations on the amount of recovery that (i) preclude

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sumption" of legislative intent that does not reflect the rules of construction that Congress understood and acted on when it adopted the statute under review is a questionable guide. See 498 U.S. at 99 n.2. Especially with respect to a statute that has a lineage as ancient as that of Section 6511 (see note 10, *supra*), any rule of construction first adopted in 1990 (see 498 U.S. at 95) must be applied with substantial deference to evidence of conflicting congressional intent.

any payment on a claim filed outside the express statutory periods established in Section 6511(a) and (ii) limit the amount of any refund to the "portion of the tax paid within" those express statutory periods —thereby precluding any refund of taxes for which an untimely claim was made. 26 U.S.C. 6511(b)(1), (b)(2)(A)-(C).

For example, under Section 6511(b)(2)(A), if a taxpayer files a claim for refund within three years of the filing of the return, as "prescribed in [Section 6511](a), the *amount* of the credit or refund *shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years* plus the period of any extension of time for filing the return." 26 U.S.C. 6511(b)(2)(A) (emphasis added). This statutory scheme is manifestly inconsistent with equitable tolling: even if a claim that is filed late were "allowed" on equitable grounds (contrary to the express prohibition of Section 6511(b)(1)), the "amount of the credit or refund" on such a claim could "not exceed the portion of the tax" paid within three years of the claim (26 U.S.C. 6511(b)(2)(A)). Thus, when (as in the present case) the refund claim is filed *more* than three years after the tax was paid, no "amount" could be paid on the claim under Section 6511(b)(2)(A).

Section 6511(b)(2)(B) is equally specific in this regard. It provides that, "[i]f the claim was not filed within" three years of the time the return was filed, then "the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim." 26 U.S.C. 6511(b)(2)(B). Under this provision, even if the untimely claims of respondents were "allowed" on equitable grounds (see 26 U.S.C. 6511(b)(1)), the

"amount of the credit or refund" permitted would be "zero"—for that is the "portion of the tax paid during the 2 years immediately preceding the filing of the claim."

Because Section 6511(b) thus imposes *substantive*, rather than procedural, limitations on tax refund recoveries, the requirements of that Section are not subject to modification under the doctrine of equitable tolling. The doctrine of equitable tolling is confined, by its terms, to statutes of limitations. The doctrine can not be applied to alter the substantive terms of the statute under which respondents seek relief. As this Court observed in *Irwin*, it is the "[t]ime requirements in lawsuits between private litigants" that are subject to the doctrine of equitable tolling. 498 U.S. at 95. In each instance that this Court has considered the doctrine, that premise has governed. See, *e.g.*, *Honda* v. *Clark*, 386 U.S. 484 (1967); *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 558-559 (1974); *Bowen* v. *City of New York*, 476 U.S. at 480. When a statutory condition *other* than a period of limitations for a filing requirement is at stake, the Court has made it clear that equitable tolling does not provide relief from the statutory conditions to recovery. See *Hallstrom* v. *Tillamook County*, 493 U.S. 20, 27 (1989) (pre-lawsuit notification requirement not a statute of limitations and not subject to equitable tolling).

As the court of appeals noted in *Webb* v. *United States*, the limitations on recovery set forth in Section 6511(b) establish a "substantive right" to be free from liability after a legislatively determined period of time. 66 F.3d at 700, citing *First United Methodist Church* v. *United States Gypsum Co.*, 882 F.2d 862, 865-866 (4th Cir. 1989), cert. denied, 493 U.S. 1070

(1990); *Goad* v. *Celotex Corp.*, 831 F.2d 508, 510-511 (4th Cir. 1987), cert. denied, 487 U.S. 1218 (1988). See also *Amoco* v. *Newton Sheep Co.*, *supra*; *Oropallo* v. *United States*, 994 F.2d at 30-31. Statutes that define substantive, rather than merely procedural, limitations on liability are not subject to tolling doctrines (*First United Methodist Church* v. *United States Gypsum Co.*, 882 F.2d at 866). That principle applies *a fortiori* to monetary claims against the United States, for only Congress may determine the conditions upon which the United States consents to be sued.

c. These substantive limitations prescribed in the Internal Revenue Code confirm that Congress has insisted upon a definite and unyielding point of repose for tax refund claims. In this context, as in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350 (1991), the "rebuttable presumption" of equitable tolling described in *Irwin* is inapplicable because the statutory scheme reflects a legislative policy of repose that is inconsistent with equitable tolling.[23]

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[23] The court of appeals stated in the present case that the presumption of equitable tolling applies to tax refund suits because "Congress has never expressed any intention that equitable tolling should not apply to § 6511" (Pet. App. 5a). For the reasons discussed in the text, that conclusion cannot be reconciled with the words of the statute.

Moreover, by adopting a "rebuttable presumption" of equitable tolling in *Irwin*, the Court obviously did not place on Congress the burden of thereafter reviewing the entire United States Code to specify which statutes are, and which are not, subject to equitable tolling. As the Court has observed, "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *Girouard* v. *United States*, 328 U.S. 61, 69 (1946). See also *Central Bank* v. *First*

In *Lampf*, the Court held that equitable tolling does not apply to the federal statute of limitations that requires claims for violations of the securities laws to be brought "within one year after the discovery of the facts constituting the violation and within three years after such violation." 15 U.S.C. 78i(e). The Court held that tolling principles did not apply to this statute because the 3-year limitation provision necessarily served as a "cutoff" of claims and established "a period of repose inconsistent with tolling." 501 U.S. at 363.[24]

In this case, as in *Lampf*, the detailed provisions of Section 6511(a) and Section 6511(b) establish a statutory "period of repose inconsistent with tolling." Thus, in explaining that the structure of Section 6511 is inconsistent with equitable tolling, the First Circuit stated in *Oropallo* v. *United States*, 994 F.2d at 30-31:

> We think that section 6511(a) and (b)(2)(A) are structured like the 1-and-3-period considered by

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Interstate Bank, 114 S. Ct. 1439 (1994) (rejecting suggestion that congressional inaction constitutes acquiescence in judicial pronouncements).

[24] The reasoning of *Lampf* has been applied in several statutory contexts. See, *e.g.*, *Central States Pension Fund* v. *Navco*, 3 F.3d 167 (7th Cir. 1993) (holding that equitable tolling is not applicable to the limitations period contained in the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. 1451(f)), cert. denied, 114 S. Ct. 1062 (1994); *Smith* v. *Secretary of the Department of Health and Human Services*, 26 Cl. Ct. 116 (holding that equitable tolling is not applicable under the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. 300aa-1 to 300aa-33), aff'd, 983 F.2d 1088 (Fed. Cir. 1992) (Table). See also *Larson* v. *Northrop Corp.*, 21 F.3d 1164, 1174-1175 (D.C. Cir. 1994).

> the Supreme Court in *Lampf*. Under section 6511, a taxpayer who has filed a return must clear two time barriers. The first one is in section 6511(a), which requires taxpayers to file a refund claim within three years of filing a return. * * *
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> * * * Under section 6511(b)(2)(A) he may [then] recover any taxes paid in the immediately preceding three-year period * * * . Unquestionably, then, that date serves as an absolute cutoff point. By imposing an "outside limit" or "cutoff" on the amount of taxes which can be recovered, section 6511(b)(2)(A) operates like the three-year portion of the limitations period in *Lampf*, and thus is a "period of repose inconsistent with tolling."

The period of repose established by Section 6511 is not subject to equitable tolling (*Webb* v. *United States*, 66 F.3d at 700-701, quoting *First United Methodist Church* v. *United States Gypsum Co.*, 882 F.2d at 866):

> That § 6511(b)(2) is analogous to a statute of repose is significant given the well-recognized distinctions between statutes of limitations and statutes of repose. While the former is "a procedural device that operates as a defense to limit the remedy available from an existing cause of action," a statute of repose, in contrast, "creates a substantive right in those protected to be free from liability after a legislatively-determined period of time."

As a "statute of repose," Section 6511 establishes "an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body." *Amoco* v. *Newton Sheep Co.*, *supra*, quoting *United States Gypsum Co.*, 882 F.2d at 866.

d. In *United States* v. *Dalm*, the Court held that an equitable claim for the recovery of taxes may not be pursued when it is first asserted after the statute of limitations in Section 6511 has expired. 494 U.S. at 610. The Court noted that Congress has carefully articulated the exceptions that are available from the specific, detailed limitations contained in Section 6511. The Court concluded that an untimely suit for refund that does not come within those specific statutory exceptions may not proceed, for any other conclusion would "override[e] Congress' judgment as to when equity requires that there be an exception to the limitations bar." 494 U.S. at 610.

The decision in *Dalm* was "almost contemporaneous with the rule announced in *Irwin*." *Webb* v. *United States*, 66 F.3d at 698. Nothing in *Irwin* "purport[s] to modify" the analysis of the Internal Revenue Code that the Court applied in *Dalm*. *Ibid.* Under that analysis, the detailed and comprehensive limitations on tax refund claims established in Section 6511 require the conclusion "that equity is not to displace the strict time limits set forth in the Internal Revenue Code." *Ibid.*

2. The Rebuttable Presumption of Equitable Tolling Described in *Irwin* Is Premised Upon Equal Treatment of Private and Government Remedies

The crucial focus of the Court's reasoning in *Irwin* was that "[e]qual treatment of private and government defendants" should be a presumptive norm, in the absence of contrary evidence of legislative intent. *Webb* v. *United States*, 66 F.3d at 696. See also *Glarner* v. *United States*, 30 F.3d 697, 701 (6th Cir. 1994); *Justice* v. *United States*, 6 F.3d 1474, 1478 (11th Cir. 1993); *Nunnally* v. *MacCausland*, 996 F.2d 1, 2-3 (1st Cir. 1993).

> [I]n *Irwin*, the Supreme Court held that where equitable tolling applies in a particular action between private parties, it similarly applies in such an action against the government. This makes sense as a "realistic assessment of legislative intent," for unless specified otherwise, there is no reason to assume that Congress would intend to make it inherently more difficult to bring suit against the government than against a private defendant. * * * The Court's express goal in *Irwin* was to level the playing field between private litigants and the government.

Webb v. *United States*, 66 F.3d at 697 (footnote omitted). Thus, "when equitable tolling applies in a case brought against a private litigant, it follows that equitable tolling should presumptively apply in a comparable case against the United States." *Ibid.*

As the court concluded in *Webb* v. *United States*, 66 F.3d at 697-698, however, that understanding of the rationale of *Irwin* is inconsistent with any presump-

tion that equitable tolling should apply in cases involving tax refund claims:

> Unlike tort actions or employment disputes, however, tax refund cases cannot be brought against private litigants, nor are they even comparable to suits that can be brought against private litigants. * * *
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> By definition, * * * tax refund suits are limited to cases where a taxpayer is suing the government for a refund. Because tax refund suits are always brought against the government, never against private parties, the presumption announced in *Irwin* does not apply to them. Since there can be no equitable tolling in such suits against private defendants, the rule in *Irwin* that "the *same* rebuttable presumption of equitable tolling *applicable to suits against private defendants* should also apply to suits aginst the United States" has no force here.

As the court stated in *Webb*, "[a]pplying the doctrine of equitable tolling in a tax refund action * * * would neither serve as a 'realistic assessment of legislative intent' nor as a 'practically useful principle of interpretation,' and nothing counsels a departure here from the traditional judicial reluctance to introduce equitable principles into the tax laws." 66 F.3d at 698.

3. No Refund May Be Allowed Even If The Limitation On Filing Claims Were Tolled

Even if principles of equitable tolling were applicable to the statute of limitations established in Section

6511(a) for tax refund claims, any recovery by respondents would be barred by the substantive limitations on the "amount" of refunds set forth in Section 6511(b). Because the taxes were paid more than three years before the claims for refund were filed, no "portion of the tax" may be refunded under the express mandate of Sections 6511(b)(2)(A) and (B). See pages 32-34, *supra*. Thus, even "apart from the limitation period imposed by section 6511(a)," respondents cannot prevail on their refund claims in this case as a matter of substantive law. *Amoco* v. *Newton Sheep Co.*, *supra*.

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

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